Supreme Court, U.S.
FILED
96 JUL 6 1998
OFFICE OF THE CLERK

No. 98

In The
Supreme Court of the United States

October Term 1998

ELLIOTT'S ENTERPRISES, INCORPORATED,

Petitioner,

v.

FLYING J, INCORPORATED; CFJ PROPERTIES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Robert H. Smallenberg
Counsel of Record
AYERS & STOLTE, P.C.
710 North Hamilton Street
Richmond, Virginia 23221
(804) 358-4731

Counsel for Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

QUESTIONS PRESENTED

I. Whether the court of appeals either created facts or ignored that essential facts were not in the record in finding that the petitioner was in laches and equitably estopped from bringing its claim.

II. Whether finding the petitioner in laches was improper in light of the fact that the statute pursuant to which petitioner brought its claim contains its own limitation of actions which should have been applied both to petitioner's equitable and legal claims.

III. Whether the court of appeals in finding, for the first time on appeal, that petitioner was equitably estopped from bringing its claim, the court of appeals grossly misapplied the Virginia doctrine of equitable estoppel.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, CFJ Properties, a Utah partnership was a party before the court of appeals.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Citation v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 6

I. The petition should be granted because the court of appeals either created facts or ignored that essential facts were not in the record in finding that the petitioner was in laches and equitably estopped from bringing its claim 6

II. The petition should be granted because the state statute pursuant to which petitioner brought its claim contains its own limitation of actions which should have been applied both to petitioner's equitable and legal claims 8

III. The petition should be granted because in finding, for the first time on appeal, that petitioner was equitably estopped from bringing its claim, the court of appeals grossly misapplied the Virginia doctrine of equitable estoppel 9

Conclusion 11

TABLE OF CITATIONS

Page:

Cases Cited:

American Nat. Bank v. Ames,
169 Va. 711, 194 S.E. 784 *cert denied*
304 U.S. 577 (1938) 7

Belcher v. Kirkwood,
238 Va. 430, 383 S.E.2d 729 (1989) 9

Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheet Metal, Inc.,
221 Va. 81, 266 S.E.2d 887 (1980) 10

Counts v. Counts,
161 Va. 768, 172 S.E. 248 (1934) 6

Crown Central Petroleum Corp. v. Hill,
No. 962601 (Sup. Ct. Va. June 6, 1997) 5

Elliott's Enterprises, Inc. v. Flying J, Inc., et al.,
No. 97-1865 (4th Cir. April 6, 1998) 1

Elliott's Enterprises, Inc. v. Flying J, Inc., et al.,
Civ. No. CA-97-193 (E. D. Va. 1997) 1

Employers Commercial Union Ins. Co. v. Great Am. Ins. Co.,
214 Va. 410, 200 S.E.2d 560 (1973) 7

Emrich v. Emrich,
9 Va. App. 288, 387 S.E.2d 274 (1989) 10

Fretwell v. Gillettte Safety Razor Co.,
106 F.2d 728 (4th Cir. 1939) *cert denied*
310 U.S. 627 (1940) 9

Hall v. Graham,
112 Va. 560, 72 S.E. 105 (1911) 7

Harshberger v. Alger,
72 Va. (31 Gratt.) 52 (1878) 9

Jeffries v. Chicago Transit Auth.,
770 F.2d 676 (7th Cir. 1985) *cert denied*
475 U.S. 1050 (1986) 8

Pittman v. Pittman,
208 Va. 476, 158 S.E.2d 746 (1968) 6

Rutledge v. Rutledge,
204 Va. 522, 132 S.E.2d 469 (1963) 6

United States ex rel. Humble Oil & Ref. Co. v. Fidelity & Cas. Co.,
402 F.2d 893 (4th Cir. 1968) 10

Statutes Cited:

Va. Code Ann. § 59.1-21 (1950, as amended) 4

Va. Code Ann. § 59.1-21.10 (1950, as amended) 1, 3

Va. Code Ann. § 59.1-21.12(B)(1950, as amended)..... 2, 8

Va. Code Ann. § 59.1-21.16:2 (1950, as amended)..... 2, 3

Rule Cited:

Federal Rule of Civil Procedure 8(c)..... 1, 10

Your Petitioner, Elliotts Enterprises, Inc., a Virginia Corporation, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Elliotts Enterprises, Inc. Flying J, Inc. and CFJ Properties*, No. 97-1865 (April 6, 1998)(App. A) is unpublished. The opinon of the district court in *Elliotts Entrpises, Inc. v. Flying J, Inc. and CFJ Properties*, Civ. No. CA-97-193 (App. B), is not published.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on April 6, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 8(c).*Affirmative Defenses*. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense . . ..

Va. Code Ann. § 59.1-21.10 (1950, as amended) (App. C).

Va. Code Ann. § 59.1-21.12(B) (1950, as amended) (App. D).

Va. Code Ann. § 59.1-21.16:2 (1950, as amended) (App. E).

STATEMENT OF THE CASE

Petitioner operates two franchised Exxon gasoline stations at the intersection of Interstate 95 and Route 104 in Caroline County, Virginia. These outlets have existed since 1964-65.

Flying J and CFJ operate a travel plaza at the same intersection. This plaza opened in February, 1995 and sells fuel to the general public at retail prices. The travel plaza is within 1 and ½ miles by the nearest surface route of the Petitioner's outlets. In fact, one of Petitioner's operations is directly across the street from the plaza.

Flying J is a Utah Corporation. CFJ is a Utah partnership. The partners of CFJ are Big West Oil Company (an affiliate or subsidiary of Flying J), Karo Oil Company and Conoco. Big West Oil Company owns and operates a refinery in Utah. Conoco is a national refiner. Conoco supplies some of the fuel sold at the travel plaza.

CFJ owns the real property upon which the Caroline County travel plaza is located while Flying J is the holder of the business license to operate it.

In 1994, Carroll Elliott, Petitioners CEO, became aware of a company named Flying J, Inc. which intended to build a travel plaza across the street from one of several Elliott's franchised gasoline outlets. Mr. Elliott had conversations with representatives of Flying J who simply informed Mr. Elliott that Flying J operated a chain of travel plazas throughout the United States. At no time did anyone tell Mr. Elliott that Flying J was either a refiner or affiliated with a refiner. Further, at no time was Mr. Elliott informed of the existence of a company called CFJ Properties or that it

would be the owner of the property and physical facilities at which the travel plaza would be located.

Mr. Elliott wrote a letter to the County of Caroline announcing support for the Flying J project and stating that he believed it would increase business for all businesses at that particular interchange.

When the travel plaza opened, it was selling gasoline products at a price approximately 10 cents per gallon cheaper that the price at which Petitioner was selling it products. purchase its product from Exxon. Perhaps even more notably, the travel plaza was selling gasoline at prices cheaper than Petitioner could purchase it from Exxon. Not surprisingly, rather than increasing business, the lower price caused Petitioner's business to decline.

In late 1996, a fellow gasoline retailer informed Carroll Elliott that he had been reading a trade magazine and had seen Flying J listed as a refiner of crude oil. Subsequent investigation confirmed that Flying J was either a refiner or that one of its subsidiaries was a refiner. Also revealed was the fact that a company known as CFJ Properties as the owner of the property upon which the travel plaza is located.

Pursuant to the Virginia Petroleum Practices Act, refiners of petroleum products may not operate a retail gasoline outlet within 1 and ½ miles of any retail outlet operated by a franchised dealer. Va. Code Ann. § 59.1-21.16:2 (1950, as amended). For purposes of the act, a "refiner" is anyone who refines crude oil to produce motor fuel and includes any affiliate of such person. Va. Code Ann. § 59.1-21.10 (1950, as amended).

A. Background of the District Court Judgment.

This action was filed by the petitioner, Elliott's Enterprises, Inc., (hereinafter referred to as "Plaintiff") against Flying J, Inc. and CFJ Properties (hereinafter referred to collectively as "Defendants") on December 26, 1996 in the Circuit Court of the County of Caroline, Virginia. By Order

entered February 18, 1997, petitioner was allowed to file an Amended Bill of Complaint.

Defendants removed this action to the United States District Court for the Eastern District of Virginia, Richmond Division, on the basis of diversity of citizenship, by Notice of Removal filed on March 17, 1997.

Petitioner alleged in its Amended Bill of Complaint that the Respondents are refiners or affiliated with refiners and are operating a retail outlet within one and one-half miles of franchised outlets operated by Petitioner in violation of the Virginia Petroleum Products Franchise Act (Va. Code Ann. §59.1-21, et seq. (1950, as amended). Plaintiff sought (1) injunctive relief whereby Defendants would be permanently enjoined from operating any retail outlet within one and one-half miles of Plaintiff's franchised locations; (2) its actual damages; (3) its reasonable attorney's fees; and (4) other such relief as the nature of the case may require.

Respondents filed a Motion to Dismiss or, in the alternative, a Motion for Summary Judgment alleging that (1) the Virginia Petroleum Products Franchise Act only extends to franchisee's relationships with their own franchisors; (2) Flying J, Inc. is not a refiner; (3) CFJ Properties does not operate the travel plaza; (4) Plaintiff's claim is barred by the doctrine of acquiescence; (5) Plaintiff's claim is barred by the doctrine of laches; and (6) Plaintiff's claim is untimely made per the express terms of the Virginia Petroleum Products Franchise Act.

After the motion was fully briefed and orally argued, the district court entered an Order was entered granting the Respondents' Motion to Dismiss on May 30, 1997, stating that the Virginia Petroleum Products Franchise Act does not protect a franchise dealer from encroachment by franchisors or refiners other than the one from which that dealer obtained his franchise. The Court further granted the Motion for Summary Judgment, finding the Plaintiff in laches.

On June 6, 1997, the Virginia Supreme Court issued an opinion ruling that the Virginia Petroleum Products Franchise

Act protects franchises from encroachment by all franchisors and refiners, including those other than the one from which the particular dealer obtained its franchise. See Crown Central Petroleum Corp. v. Hill, No. 962601 (Va., June 6, 1997). Accordingly, on June 13, 1997, the U. S. District Court vacated its May 30, 1997 Order.

On June 19, 1997 following a telephone conference call between the district court judge and counsel of record, the district court entered another Final Order, this time granting the Motion for Summary Judgment based only upon its finding that the Plaintiff was in laches. On June 27, 1997, Plaintiff timely noted its appeal to the Fourth Circuit Court of Appeals.

2. Proceedings in the Court of Appeals

The Fourth Circuit Court of Appeals had appellate jurisdiction over this matter pursuant to 28 U.S.C. § 1291 in that Judge Richard L. Williams of the United States District Court for the Eastern District of Virginia entered a final order granting defendant's Motion For Summary Judgment and disposing of all claims with respect to the parties herein on June 19, 1997. Petitioner timely noted its appeal on June 27, 1997.

Following briefing and oral argument, the Court of Appeals on April 6, 1998 entered its judgment affirming the decision of the district court. In so doing, the Court of Appeals explained that the district court was correct in its determination that the doctrine of laches barred Petitioner's claims for equitable relief. Though not relied upon by the district court, the court of appeals went on to determine that Petitioners legal claims were barred by the doctrine of equitable estoppel.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS EITHER CREATED FACTS OR IGNORED THAT ESSENTIAL FACTS WERE NOT IN THE RECORD IN FINDING THAT THE PETITIONER WAS IN LACHES AND EQUITABLY ESTOPPED FROM BRINGING ITS CLAIM.

The petitioner did not know that Flying J was a refiner or affiliated with a refiner and did not know of the existence of CFJ Properties, therefore, at the time Mr. Elliott wrote the letter supporting respondents' endeavor, petitioner was wholly unaware that it would be illegal pursaunt to Virginia law for respondents to operate the travel plaza.

Laches implies knowledge or means of knowing one's rights, depending upon the particular facts of each case. Counts v. Counts, 161 Va. 768, 172 S.E. 248 (1934). Such a defense is only permitted in equity to defeat an acknowledged right on the ground that it affords evidence that the right has been abandoned. Rutledge v. Rutledge, 204 Va. 522, 132 S.E.2d 469 (1963); Pittman v. Pittman, 208 Va. 476, 158 S.E.2d 746 (1968).

In the instant case, Petitioner was informed that Flying J intended to open a travel plaza and that Flying J operated a line of travel plazas. At no time was Petitioner informed that Flying J was a petroleum refiner or affiliated with a petroleum refiner. Further support for the fact that Petitioner was not informed of Flying J's refiner status is that consistently throughout proceedings in the trial court and the Court of Appeals, Flying J denied that it is a refiner or affiliated with a refiner. It flies in the face of logic to accept the defendants' assertion that Petitioner had knowledge of a fact which to date, the Respondents themselves deny.

The duty of a party to commence proceedings to assert his rights can only arise upon the discovery of a fraud or mistake, and the possible effect of laches will begin to operate only from that time. Hall v. Graham, 112 Va. 560, 72 S.E. 105 (1911). Where the defendant had never fully disclosed all the circumstances to the plaintiff, and the plaintiff had relied on what information had been imparted to them, and had waited three years to bring a suit for an accounting, this delay was held not to be such laches as would prevent them from gaining the relief which they sought. Houston v. Dexter & Carpenter, Inc., 300 F. 354 (E.D. Va. 1924), modified, 20 F.2d 647 (4th Cir. 1927).

The defense of equitable estoppel likewise requires knowledge of the essential facts. Employers Commercial Union Ins. Co. of America v. Great Am. Ins. Co., 214 Va. 410, 200 S.E.2d 560 (1973). Estoppel will never lie unless the party against whom it is invoked had full knowledge of his rights and all the material facts and circumstances of the case. American Nat. Bank v. Ames, 169 Va. 711, 194 S.E. 784, cert. denied, 304 U.S. 577, 58 S. Ct. 1046, 82 L. Ed. 1540 (1938)

The only reference as to whether or not Petitioner was aware Flying J was a refiner or affiliated with a refiner in the opinion of the Court of Appeals is the statement, "[M]r. Elliott allegedly discovered that Flying J or its affiliates were 'refiners' of crude oil. . . . Further, Mr. Elliott allegedly discovered that CFJ Properties . . . owned the property on which Flying J operated its retail outlet and that CFJ's partners included oil refiners, one of which supplied Flying J with petroleum products. (App. A, p. 3). In order to find Petitioner in laches or equitably estopped from asserting its claims, the Court of Appeals had to assume facts not in the record in order to achieve a desired end.

Petitioner's lack of knowledge that Flying J is a refiner or affiliated with a refiner and its lack of knowledge as to the existence of CFJ Properties go to the very heart of this case. Without this essential knowledge, petitioner was unaware, at the time he wrote his letter, that the respondents'

operation of the travel plaza was illegal pursuant to Virginia statutory law.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE STATE STATUTE PURSUANT TO WHICH PETITIONER BROUGHT ITS CLAIM CONTAINS ITS OWN LIMITATION OF ACTIONS WHICH SHOULD HAVE BEEN APPLIED BOTH TO PETITIONER'S EQUITABLE AND LEGAL CLAIMS.

> A. Any person who violates any provision of this chapter shall be civilly liable for liquidated damages of $2,500 and reasonable attorney's fees, plus provable damages caused as a result of such violation, and be subject to such other remedies, legal or equitable, including injunctive relief, as may be available to the party damaged by such violation. Such action shall be brought in the circuit court of the jurisdiction wherein the franchised premises are located . . ..
>
> B. No action may be brought under the provisions of this chapter for a cause of action which arises more than two years prior to the date on which such action is brought.

Va. Code Ann. § 59.1-21.12(B) (1950, as amended).

"Laches is generally a factual question not subject to summary judgment." Jeffries v. Chicago Transit Auth., 770 F.2d 676, 679 (7th Cir. 1985), cert. denied, 475 U.S. 1050, 89 L. Ed. 2d 581, 106 S. Ct. 1273 (1986). In appropriate cases, equity acts by analogy, that is, it applies the same bar to claims that would be applied at law, under the statute, to

legal claims of analogous character. Harshberger v. Alger, 72 Va. (31 Gratt.) 52 (1878). Federal courts in the enforcement of legal rights will ordinarily follow state statutes of limitations in applying the doctrine of laches. Fretwell v. Gillette Safety Razor Co., 106 F.2d 728 (4th Cir. 1939), cert. denied, 310 U.S. 627, 60 S. Ct. 978, 84 L. Ed. 1398, rehearing denied, 311 U.S. 724, 61 S. Ct. 55, 85 L. Ed. 472 (1940) and 313 U.S. 600, 61 S. Ct. 1106, 85 L. Ed. 1552 (1941). State limitation periods, whether greater or less, may be considered in determining what is prejudicial delay. Giddens v. Isbrandtsen Co., 355 F.2d 125 (4th Cir. 1966). It is a well-established principle, uniformly acted upon by the courts of equity, that in respect to the statute of limitations equity follows the law; and if a legal demand be asserted in equity which at law is barred by statute, it is equally barred in equity. Belcher v. Kirkwood, 238 Va. 430, 383 S.E.2d 729 (1989).

The Virginia General Assembly enacted the relevant provisions of the Petroleum Products Franchise Act and provided for both legal and equitable remedies for violations of the Act. Further, the Act contains its own two year limitations period. This is the period which must be applied irrespective of whether the action brought seeks legal redress, equitable relief, or a combination of both.

III.

THE PETITION SHOULD BE GRANTED BECAUSE IN FINDING, FOR THE FIRST TIME ON APPEAL, THAT PETITIONER WAS EQUITABLY ESTOPPED FROM BRINGING ITS CLAIM, THE COURT OF APPEALS GROSSLY MISAPPLIED THE VIRGINIA DOCTRINE OF EQUITABLE ESTOPPEL.

Respondents did not allege equitable estoppel in their answer to petitioners Bill of Complaint. Further, the district court did not rely upon the doctrine in its order dismissing

petitioner's claims. Federal Rule of Civil Procedure 8(c) requires that affirmative defenses be raised in the responsive pleadings. Respondents' claim that petitioner is equitably estopped should be barred by the respondents' failure to raise the defense in the affirmative pleadings.

It is essential to the application of the principles of equitable estoppel, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was not only ignorant of the true state of facts, but had no convenient and available means of acquiring such information; and where the facts are known to both parties, and both had the same means of ascertaining the truth, there can be no estoppel. Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheet Metal, Inc., 221 Va. 81, 266 S.E.2d 887 (1980).

In the instant case, the Respondents built their travel plaza in direct violation of Virginia law. Everyone is charged with knowledge of the law. The respondents cannot assert that they were ignorant of Virginia law and lulled by such ignorance into violating state law.

Equitable estoppel applies when one person, by his statements or conduct **has induced another**, who has a right to rely upon those statements, or conduct and **who does rely upon them in good faith**, and the latter has so far changed position that he would be injured thereby. Emrich v. Emrich, 9 Va. App. 288, 387 S.E.2d 274 (1989)(emphasis added). The doctrine is invoked by courts to aid a party who, in good faith, has relied, to his detriment, upon the representations of another. United States ex rel. Humble Oil & Ref. Co. v. Fidelity & Cas. Co., 402 F.2d 893 (4th Cir. 1968).

In the instant case, the Court of Appeals plainly misapplied the Virginia doctrine of equitable estoppel. In so far as respondents already planned on building their travel plaza before Mr. Elliott made any statement, respondents cannot properly allege that they were induced by or relied upon Mr. Elliott's statements or actions. In the absence of

such inducement or reliance, equitable estoppel does not apply.

CONCLUSION

In assuming facts not contained in the record, that is that Petitioner knew or should have known that Flying J was a refiner and that Petitioner should have known of the existence of CFJ Properties, that it owned the travel plaza and that it was affiliated with refiners, the Court of Appeals, in effect, has fit the facts to justify a desired end. The end must be based upon the facts, not the other way around.

In applying the doctrines of laches and equitable estoppel in the face of the Virginia Petroleum Practices Act's own provisions limiting the time in which an action may be brought, the Court of Appeals ventured into an area in which the Virginia Supreme Court has made no determination.

The Court of Appeals misapplied the doctrine of equitable estoppel in determining that it applied in the instant case.

Accordingly, Elliott's Enterprises, Inc. respectfully requests that its petition for a writ of certiorari be granted.

Respectfully Submitted,

Robert H. Smallenberg
Va. Bar Number 35848
Ayers & Stolte, P.C.
710 North Hamilton Street
Richmond, Virginia 23221
(804) 358-4731

Counsel of Record

TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered April 6, 1998 ..... App. 1

Final Order
United States District Court
For the Eastern District of Virginia
Richmond Division
entered June 19, 1997 ..... App. 9

Va. Code Ann. § 59.1-21.10
(1950, as amended) ..... App. 10

Va. Code Ann. § 59.1-21.12
(1950, as amended) ..... App. 12

Va. Code Ann. § 59.1-21.16:2
(1950, as amended) ..... App. 12

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELLIOTT'S ENTERPRISES, INCORPORATED,
Plaintiff-Appellant,

v.

FLYING J, INCORPORATED; CFJ PROPERTIES,
Defendants-Appellees.

No. 97-1865

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-97-193)

Argued: January 26, 1998
Decided: April 6, 1998
Entered: April 6, 1998

Before ERVIN and WILLIAMS, Circuit Judges, and GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert Henry Smallenberg, AYERS & STOLTE, Richmond, Virginia, for Appellant. Douglas R. Cox, GIBSON, DUNN & CRUTCHER, L.L.P., Washington, D.C., for Appellees. **ON BRIEF:** F. Joseph Warin, Eugene Scalia, GIBSON, DUNN & CRUTCHER, L.L.P., Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Elliott's Enterprises, Inc. (Elliott's) operates two Exxon retail outlets off Interstate 95 in Carmel Church, Caroline County, Virginia. In 1994, Elliott's CEO Carroll Elliott became aware that Flying J, Inc. (Flying J), a Utah corporation, planned to build a travel plaza directly across the street from an Elliott's retail outlet. Flying J proposed that the travel plaza would include a restaurant, convenience store, and fueling facilities for both cars and trucks. Before beginning construction, Flying J invited community members to an open house to discuss Flying J's plans. Mr. Elliott became convinced that Flying J's travel plaza would increase overall traffic volume at the highway interchange, thereby increasing revenues for all retail outlets at the intersection, including his own. Mr. Elliott wrote a letter to Caroline County authorities endorsing Flying J's proposal and urging its approval. J.A. at 62-63. In his letter, Mr. Elliott explained: "Speaking of pricing on the market: I have been faced with this pricing strategy on the eastside. . . . I am the only dealer-operated business on the exit. . . . All the rest of the businesses buy petroleum as a jobber or marketer. This

gas is normally priced 6 to 15 cents cheaper tha[n] I can buy it. The truck stops and other jobbers, Amoco and Citgo, sell millions of gallons of petroleum at a much higher margin of profit than I do. However, I am still in business. . . . This new plaza can only move my gross business up. . . . I can grow." J.A. at 62-63. Mr. Elliott forwarded a copy of his letter to Craig Call, Flying J's community liaison. J.A. at 61.

In August 1994, Flying J wrote Mr. Elliott that it had received zoning approval for the site and would begin building in 1995. J.A. at 44. By May 1995, Flying J had obtained a building permit and begun construction directly across the street from and in plain view of the Elliott's outlet. J.A. at 47, 50-51, 129. After eight months of construction costing millions of dollars, Flying J opened for business in January 1996. J.A. at 43, 47. Flying J sold petroleum products more profitably than Elliott's, as Mr. Elliott had expected. J.A. at 62-63. Within a few months, Mr. Elliott realized that the increased traffic on the interchange did not have the desired effect on his business. In late 1996, Mr. Elliott allegedly discovered that either Flying J or its affiliates were "refiners" of crude oil. Cf.VA. CODE ANN. § 59.1-21.16:2(A) (Michie 1997) (prohibiting petroleum refiners from operating retail outlets within a one and one-half mile radius of existing retail outlets). Further, Mr. Elliott allegedly discovered that CFJ Properties (CFJ) owned the property on which Flying J operated its retail outlet and that CFJ's partners included oil refiners, one of which supplied Flying J with petroleum products. Despite his earlier support for Flying J's efforts, Mr. Elliott decided to sue for legal and equitable relief. On December 26, 1996, Elliott's filed a bill of complaint against Flying J and CFJ in Caroline County Circuit Court. After Elliott's amended its complaint, Flying J and CFJ timely removed the action to federal court based on diversity between the parties.

In its amended complaint, Elliott's claimed that both Flying J and CFJ were petroleum refiners or were affiliated with such refiners and that they operated a retail outlet

within one and one-half miles of Elliott's franchised outlets in violation of the Virginia Petroleum Products Franchise Act. Elliott's sought injunctive relief enjoining Flying J and CFJ from operating the retail outlet, actual damages, attorney fees, and other unspecified relief. J.A. at 5-7. Flying J and CFJ countered with a motion to dismiss, or in the alternative, a motion for summary judgment. Flying J and CFJ contended that the Act extended only to franchisee's relationships with their own franchisors and that the doctrines of acquiescence and laches barred Elliott's claim. J.A. at 9-39. At a hearing held on May 29, 1997, the district court granted Flying J and CFJ's motion for summary judgment. J.A. at 140-41. By order dated May 30, 1997, the district court held that the Virginia Petroleum Products Franchise Act does not protect a franchise dealer from encroachment by franchisors or refiners other than the franchisor from whom the dealer obtained its franchise. In the alternative, the court granted summary judgment based on Elliott's laches. J.A. at 144. On June 6, 1997, the Virginia Supreme Court issued an opinion holding that the Virginia Petroleum Products Franchise Act protects franchises from encroachment by all franchisors and refiners, not just those from whom the franchise dealer obtained its franchise. See Crown Central Petroleum Corp. v. Hill, 488 S.E.2d 345 (Va. 1997). Accordingly, the district court vacated its May 30, 1997 order. J.A. at 145. After a conference with the parties, the court entered a final order granting summary judgment on June 19, 1997. J.A. at 146. In its order, the district court concluded that laches barred Elliott's claim for legal and equitable relief.

The Court reviews a district court's grant of summary judgment denovo. See Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 276 (4th Cir. 1997) (citing Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988)). In reviewing a grant of summary judgment, the Court may affirm on any legal ground supported by the record, and the Court is not limited to the grounds relied on by the

district court. Jackson v. Kimel, 992 F.2d 1318, 1322 (4th Cir. 1993). However, summary judgment is proper only when material facts are not in dispute. See FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In deciding whether material facts are in dispute, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). To avoid summary judgment, the nonmovant's evidence must be of sufficient quantity and quality as to establish a genuine issue for trial. Id.

Elliott's bill of complaint requested legal damages and attorney fees, as well as injunctive relief. In granting Flying J and CFJ's summary judgment motion, the district court correctly reasoned that laches barred Elliott's claim for equitable relief:"[A]fter the CEO of Elliott advocated zoning approval and publicly supported building the truck stop, and then [sat] idly by while the defendant spent 9 million dollars building it, and then waited to see the effect that the truck stop would have on his company's profits. . . . [Elliott's] cannot be heard to complain that the same . . . truck stop violates its rights under the Petroleum Products Franchise Act." J.A. at 141. However, laches generally is regarded as an inappropriate defense to claims for legal damages. See City of Portsmouth v. City of Chesapeake, 349 S.E.2d 351, 354 (Va. 1986) ("A proceeding to enforce a legal right is not subject to the equitable defense of laches.") (citing Grenco Real Estate Inv. Trust v. Nathaniel Greene Dev. Corp., 237 S.E.2d 107, 111 (Va. 1977); Finkel Outdoor Prods., Inc. v. Bell, 140 S.E.2d 695, 699 (Va. 1965)); 1 DAN B. DOBBS, LAW OF REMEDIES § 2.4(4), at 104 (2d ed. 1993) ("When laches does not amount to estoppel or waiver, it does not ordinarily bar legal claims, only equitable remedies."). But see Maksym v. Loesch, 937 F.2d 1237, 1247-48 (7th Cir. 1991) (noting that "[l]aches is an equitable doctrine but one increasingly applied in cases at law," although ultimately determining that laches could not be applied in a suit for

purely legal damages). Further, when a complainant presents mixed claims--that is, legal and equitable—courts have held that laches may be raised as a defense to the equitable claims alone. Nilsen v. City of Moss Point, 674 F.2d 379, 388 (5th Cir. 1982); Crot v. Byrne, 646 F. Supp. 1245, 1253 (N.D. Ill. 1986).

Even if laches may not be asserted against claims for legal damages, the defense of equitable estoppel bars both legal and equitable claims. See Massachusetts Bonding & Ins. Co. v. Piedmont Serv. Station, Inc., 181 S.E. 397, 400 (Va. 1935). Estoppel is a theory similar to laches and acquiescence. See 1 DOBBS , supra, § 2.3(5), at 88-89 (noting that courts refer to the doctrines of estoppel, laches, waiver, and acquiescence loosely and interchangeably and that "[e]stoppel is closely related to and sometimes identical with laches"); 2 id. § 6.4(6), at 106; see also City of Portsmouth, 349 S.E.2d at 354.* The Supreme Court of Virginia has defined the doctrine of equitable estoppel as "the consequence worked by operation of law which enjoins one whose action or inaction has induced reliance by another

---

*Federal Rule of Civil Procedure 8(c) requires affirmative defenses to be raised in responsive pleadings. However, when an affirmative defense is raised at the trial court in a manner that does not result in unfair surprise, technical failure to comply precisely with Rule 8(c) is not fatal. Dresser Indus. v. Pyrrhus AG, 936 F.2d 921, 928 (7th Cir. 1991); Allied Chem. Corp. v. Mackay, 695 F.2d 854, 855-56 (5th Cir. 1983). In this case, Flying J and CFJ's summary judgment motion raised the defense of acquiescence, a notion similar to estoppel. 1 D OBBS, supra, § 2.3(5), at 88. Although the appellees labeled the defense as acquiescence, the parties set forth facts establishing equitable estoppel. See J.A. at 41-63. Indeed, Elliott's interpreted the appellees' assertion of acquiescence as an equitable estoppel defense. See J.A. at 76. Thus, it is appropriate for the Court to rely on estoppel in affirming the district court's grant of summary judgment. Cf. Home Ins. Co. v. Matthews, 998 F.2d 305, 309 (5th Cir. 1993) (finding pleading that raised defense of estoppel sufficient to raise defense of waiver); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1275 (2d ed. 1990) (noting liberality with which courts construe pleadings under Federal Rules).

from benefiting from a change in his position at the expense of the other." Employers Commercial Union Ins. Co. v. Great Am. Ins. Co., 200 S.E.2d 560, 562 (Va. 1973). Thus, a party will be prevented by its own conduct from asserting a right that causes detriment to a party who justifiably relied on such conduct and acted accordingly. Princess Anne Hills Civic League, Inc. v. Susan Constant Real Estate Trust, 413 S.E.2d 599, 603 (Va. 1992); Webb v. Webb, 431 S.E.2d 55, 61 (Va. Ct. App. 1993). Absent a showing of fraud or deception, the elements of equitable estoppel are (1) a representation, (2) reliance, (3) change of position, and (4) detriment. Princess Anne, 413 S.E.2d at 603 (citation omitted). "To establish equitable estoppel, it is not necessary to show actual fraud, but only that the person to be estopped has misled another to his prejudice, or that the innocent party acted in reliance upon the conduct or misstatement by the person to be estopped." Waynesboro Village, LLC v. BMC Properties, No. 970343, 1998 WL 24141, *4 (Va. Jan. 9, 1998) (quoting T... v. T..., 224 S.E.2d 148, 152 (Va. 1976)). The party who relies upon estoppel must prove each element by clear, precise, and unequivocal evidence. Princess Anne, 413 S.E.2d at 603. Intent to relinquish a known right is not an element of equitable estoppel. Employers Commercial Union, 200 S.E.2d at 562 (distinguishing equitable estoppel from waiver). Courts may presume that a party possessed knowledge of facts basic to the exercise of a right when the facts would cause a reasonably prudent person to pursue an inquiry and to acquire knowledge. Id.

In this case, Elliott's CEO Carroll Elliott overtly and publicly represented to Flying J that he was in favor of Flying J's plans to build a travel plaza directly across the street from an Elliott's Exxon station. J.A. at 42, 61-63. Although Mr. Elliott was aware that Flying J could sell gas more profitably than Elliott's, J.A. at 62 ("Speaking of pricing on the market: I have been faced with this pricing strategy on the eastside. . . . I am the only dealer-operated business on the exit. . . . All the rest of the businesses buy

petroleum as a jobber or marketer. This gas is normally priced 6 to 15 cents cheaper than I can buy it. The truck stops and other jobbers, Amoco and Citgo, sell millions of gallons of petroleum at a much higher margin of profit than I do. However, I am still in business."), he actively encouraged Caroline County officials to approve Flying J's proposal. J.A. at 63 ("This new plaza can only move my gross business up. . . . I can grow. . . . I think we should all get on [Flying J's] side and let this project exist to support the county tax base. . . . If [Flying J] does not come here, then it will be put at another exit close by and out of this county."). Flying J, believing that Elliott's acquiesced in its construction plans and acting with Elliott's encouragement, invested $9 million in building a travel plaza, while Mr. Elliott presumably watched the blocks being laid from across the street. J.A. at 42, 47. Elliott's belated demand that Flying J shut down its multi-million dollar travel plaza and pay damages, if granted, would greatly prejudice the appellees. Further, although Mr. Elliott knew that the travel plaza would compete with Elliott's retail outlets by selling petroleum products more profitably, J.A. at 62-63, a fact that would cause a reasonably prudent person to inquire how Flying J was able to compete so effectively, he refrained from investigation until after Elliott's began to lose money and after Flying J spent millions. Flying J and CFJ have proved these facts by clear and unequivocal evidence, and Elliott's cannot now be heard to complain about a competing business that it so actively solicited. Accordingly, the Court finds Elliott's claim for relief barred by the defenses of laches and equitable estoppel. The Court affirms the judgment of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ELLIOTT'S ENTERPRISES, INC.,
Plaintiff,

v.

FLYING J., INC., and CFJ PROPERTES,
Defendants.

Civil Action Number 3:97cv193

Filed: June 19, 1997
Entered: June 19, 1997

FINAL ORDER

Following the Court's Order of June 13 vacating its May 30 Final Order dismissing this case, a conference call was held wherein the Court entertained the plaintiff's argument that the Court should reopen the case for an evidentiary hearing on the issue whether the plaintiff was in laches. The Court declines to reopen the case. Rather, it adheres to its prior ruling on the laches issue and therefore GRANTS the defendants' motion for summary judgment. This case remains DISMISSED WITH PREJUDICE.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Date: June 19, 1997 /s/_____
Richard L. Williams
SENIOR UNITED STATES JUDGE

§59.1-21.10. Definitions.

As used in this chapter, the following terms have the following meanings unless the context required otherwise:

"Dealer" means any person who purchases motor fuel for sale to the general public for ultimate consumption. "Dealer" shall not mean any person, including any affiliate of such person, who (i) purchases motor fuel for sale, consignment, or distribution to another; (ii) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier; (iii) who is an employee of, or merely serves as a common carrier providing transportation service, for such person.

"Designated family member" means the adult spouse, adult child or stepchild, or adult brother or sister of the dealer who is designated in the franchise agreement as the successor to the dealer's interest under the agreement and who shall become the dealer under the completion of the succession.

"Franchise" or *"franchise agreement"* means any agreement, express or implied, between a refiner and a dealer under which a refiner authorizes or permits a dealer to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner. "Franchise" or "franchise agreement" shall also mean any agreement, express or implied, under which a dealer is granted the right to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner.

"Franchise fee" means any fee or charge that a dealer is required to pay or agrees to pay for the right to enter a franchise agreement or to become a dealer at the premises to which the franchise agreement relates. The term "franchise fee" shall not include reasonable actual costs and

expenses incurred by the refiner in effecting the assignment, transfer, or sale.

"Franchisor" means a refiner who authorizes or permits, under a franchise, a dealer to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

"Newly remodeled facility" means a retail outlet, marketing premises, or leased marketing premises which, within an eighteen-month period, has been rebuilt, renovated, or reconstructed at a cost of $350,000 or more.

"Operation of a retail outlet" means the ownership or option to buy a properly zoned parcel of property for which a permit to build a retail outlet has been granted.

"Person" means person as defined in § 1-13.19.

"Petroleum products" or *"motor fuel"* means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

"Profit" means the net gain, for income tax purposes, realized by the dealer upon the assignment, transfer, or sale of the franchise agreement.

"Refiner" means any person engaged in the refining of crude oil to produce motor fuel and includes any affiliate of such person.

"Retail" means the sale of the petroleum products for purposes other than resale.

"Retail outlet," "marketing premises," or *"leased marketing premises"* means the premises at which petroleum products are sold to the general public.

"Trial franchise" means the same as provided in the Petroleum Marketing Practices Act (15 U.S.C. § 2803 et seq.).

(1973, c. 423; 1979, c. 306; 1990, c. 907.)

§ 59.1-21.12. Civil action for violation of chapter.

A. Any person who violates any provision of this chapter shall be civilly liable for liquidated damages of $2,500 and reasonable attorney's fees, plus provable damages caused as a result of such violation, and be subject to such other remedies, legal or equitable, including injunctive relief, as may be available to the party damaged by such violation. Such action shall be brought in the circuit court of the jurisdiction wherein the franchised premises are located. For the purposes of subdivisions 5 and 9 of § 59.1-21.11, a proposed transferee, assignee, or designated family member who is not approved as a dealer by a refiner shall have legal standing to challenge a refiner's compliance with the provisions of this section relating to assignment.

B. No action may be brought under the provisions of this chapter for a cause of action which arises more than two years prior to the date on which such action is brought.

(1973, c. 423; 1990, c. 907.)

§ 59.1-21.16:2. Operation of retail outlet by refiner; apportionment of fuels during periods of shortage; rules and regulations.

A. After July 1, 1979, no refiner of petroleum products shall operate any major brand, secondary brand, or unbranded retail outlet in the Commonwealth of Virginia with company personnel, a parent company, or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the refiner; however, such refiner may operate such retail outlet with the aforesaid personnel, parent, person, firm or corporation if such outlet is located not less than one and one-half miles, as measured by the most direct surface transportation route, from the nearest retail outlet operated by any franchised

dealer; and provided, that once in operation, no refiner shall be required to change or cease operation of any retail outlet by the provisions of this section.

During the period July 1, 1990, through June 30, 1991, no refiner may construct and operate with company personnel as defined in this section any new major brand, secondary brand, or unbranded retail outlet in the Commonwealth of Virginia, except on any property purchased or under option to purchase by March 1, 1990.

B. Every refiner of petroleum products shall apportion all gasoline and diesel fuel among their purchasers during periods of shortages on an equitable basis.

C. No new lease, lease renewal, new supply contract, or new supply contract renewal under this chapter shall impose purchase or sales quotas.

D. The Commissioner of Agriculture and Consumer Services shall adopt regulations (i) defining the circumstances under which a refiner may temporarily operate a previously dealer-operated retail outlet; (ii) providing for the rebuilding or relocation of retail outlets which were producer or refiner operated on July 1, 1979; (iii) requiring each refiner to file a list of retail outlets operated by such refiner and to keep such listing current; (iv) requiring each franchise dealer to file a listing of any retail outlets operated by such franchise dealer, and to keep such list current.

E. The provisions of this section shall not be applicable to retail outlets operated by producers or refiners on July 1, 1979.

(1979, c. 306; 1984, c. 720; 1990, c. 907; 1995, c. 664.)

The 1995 amendment substituted "diesel fuel" for "special fuels' in subsection B.

Subsection C federally preempted. - The prohibitions on gasoline purchase or sales quotas contained in subsection C of this section are preempted by the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 to

2806, but are not impliedly preempted by the Lanham Trade-Mark Act, 15 U.S.C. § 1127. Mobil Oil Corp. v. Virginia Gasoline Marketers & Automotive Repair Ass'n, 34 F.3d 220 (4th Cir. 1994), cert. denied, 513 U.S. 1148, 115 S. Ct. 1097, 130 L. Ed. 2d 1065 (1995).

The grandfather clause of this act exempts a retail gasoline outlet that was operated by a producer or refiner on July 1, 1979, and subsequently operated by a company that is not a producer or refiner under this act. Beach Robo, Inc. v. Crown Cent. Petro. Corp., 236 Va. 131, 372 S.E.2d 144 (1988); Beach Robo, Inc. v. Crown Cent. Petro., Inc., 860 F.2d 606 (4th Cir. 1988).

This section regulates interbrand competition because it prohibits a refiner from operating a retail outlet unless that outlet is located one and one-half miles or more from a retail outlet operated by a franchised dealer, including franchised dealers that are not franchisees of the refiner. Crown Cent. Petro. Corp. v. Hill, 254 Va. 88, 488 S.E.2d 345 (1997).